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In the

United States Court of Appeals

For the Seventh Circuit

No. 11969

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

HERMAN DAVID,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
Win G. Knoch,
Judge Presiding.

Brief and Appendix of Appellant

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Summary of Argument.

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UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. HERMAN DAVID, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Win G. Knoch, Judge Presiding.

Brief and Appendix of Appellant

May It Please The Court:

STATEMENT OF FACTS.

The defendant, Herman David, was convicted by the Court after a trial without a jury of the charge hereinafter set forth in the indictment, and was sentenced to imprisonment for a period of two years.

The Indictment.

The indictment consisted of two counts. Count One charged that the defendant on November 20, 1953 did unlawfully have in his possession five (5) gallons of distilled spirits, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed upon such spirits, as required by law; in violation of Section 2803(a), Title 26, United States Code.

Count Two charged that the defendant, on said date did unlawfully and willfully remove, deposit and conceal certain goods and commodities, to wit, five (5) gallons of distilled spirits, for and in respect whereof a tax was then and there imposed, with intent to defraud the United States of such tax; in violation of Section 3321(a), Title 26, United States Code. (App. 10.)

Proceedings Before the Trial.

The defendant filed a petition to suppress certain evidence. In said petition he has alleged (App. 10-14.)

"On November 20, 1953, while he was seated in an automobile, owned by him, on the south side of East 45th Street just west of the corner of 45th Street and South Vincennes Avenue in the City of Chicago, Illinois, two agents, Fred D. Roseboro and Carl Hanbach, employees of the Alcohol Tax Unit, a branch of the Treasury Department of the United States of America, placed your petitioner under arrest and took him into custody and searched the said automobile and found therein three one gallon glass jugs containing alcohol that were in a shopping bag, and two one gallon glass jugs containing alcohol, which were in another shopping bag. Both of these shop-

ping bags were in the back of the automobile on the floor thereof between the back seat of the automobile and the front seat thereof.

"At the said time and place the said jugs of alcohol were possessed by and owned by your petitioner.

"At the time that your petitioner was seized and taken into custody, the aforesaid agents did not have a warrant for his arrest, nor a search warrant to search either him nor the aforesaid automobile, or any process of any kind, or any authority of any law.

"The said arrest of your petitioner by the said agents was illegal and the search made by the said agents was illegal, in that, the said search and seizure of the said jugs and alcohol was not made pursuant to and incidental to a lawful arrest, and the said seizure of the said jugs and the said five gallons of alcohol was unlawful, and both the search and seizure were in violation of the 4th and 5th Amendments of the Constitution of the United States of America.

"Your petitioner is informed and believes, and based upon such information and belief so states the fact to be that there was no sufficient knowledge of facts or circumstances to justify a man of prudence and caution to believe that a violation of the laws of the United States of America was then and there being violated, and your petitioner is informed and believes that the said United States of America, Plaintiff, expects to use said illegally seized property as a result of the said illegal search together with everything procured by said plaintiff as the result of information and clues procured from the said search and seizure against your petitioner on a trial of the above entitled cause.

"Your petitioner further represents that the use and evidence against your petitioner on the trial of the above entitled cause of the property described, to-wit: five gallons of alcohol, or any part thereof, and the use of any and all evidence obtained by the United States of America as a result of information and clues from the said unlawful search and seizure is in violation of the rights of your petitioner under the 4th and 5th Amendments to the Constitution of the United States."

A hearing was had on the motion to suppress. When the cause came on for trial, the defendant waived a trial by jury (App. 26) and on stipulation of the parties, by their attorneys, it was ordered that the evidence which had been presented on the motion to suppress evidence "shall be submitted to the Court as evidence on the question of the guilt or innocence of the defendant" (App. 26).

The Court in a memorandum opinion denied the defendant's petition to suppress evidence (App. 22-24).

The Evidence on the Motion to Suppress.

Herman David, the Petitioner, testified (App. 33-42) that on or about November 20, 1953, at about 10:30 A.M., he was in the neighborhood of 45th Street and Vincennes Avenue, Chicago, Illinois, driving east on 45th Street (App. 33.) It seemed as if a tire was going flat, and he parked his car.

A man came up to him and told him that he was under arrest. He had no warrant of arrest with him, nor a search warrant (App. 34.) David had five one-gallon jugs containing spirits in the back of his car. These jugs were about eleven inches high and were in bags, and these were, in turn, in shopping bags. The tops of the bags were about eight to ten inches above the top of the jugs. Paper was on top of the bottles, which were not visible to anybody who might look into the bags (App. 35.)

The necks of the bottles were about two inches high. The men who arrested David took the automobile and the jugs (App. 36.)

On cross examination David testified that he had just parked his car when the men came up to his car (App. 37.) He testified that he was not about to make a delivery of five gallons of alcohol to 4502 S. Vincennes Avenue (App. 38, 39.)

Carl G. Hambach, an Investigator for the Alcohol Tax Unit, Bureau of Internal Revenue, testified (App. 42-62) that he had occasion to make an investigation of Herman David, first beginning in the latter part of February or the first part of March, 1953 (App. 43.) He saw David on November 6th, 12th, 13th and 20th, 1953 (App. 44.) On November 6 he was watching David's home in Dolton and saw him leave in a Packard automobile, accompanied by a lady and a Boxer dog. He followed the automobile and dropped him at South Park and 45th Street. There he contacted Investigator Fletcher on the radio (App. 44, 45.)

Hambach further testified that he saw the defendant around the latter's home in Dolton on November 12, and 13, followed him, but lost him in town and did not see where the defendant went (App. 45.) On November 20 he saw the petitioner park his car at the curb on 45th Street, just west of Vincennes Avenue, and talk to Investigator Roseboro. Through the window he was able to see in the back of the car a paper bag that contained three one-gallon glass jugs. Investigator Roseboro *had taken* the cap off one of them and tasted it and said "It's alcohol." I said to David, "You're under arrest" (App. 46.) He talked to David at the Alcohol Unit office, and David told him that he was in financial difficulty; that he was buying alcohol from a fellow on the South Side for $6 a gallon, and selling it for $7 (App. 47.)

Hambach further testified that he knew that Mr. David had been arrested several times and, over objection, was permitted to testify that he was convicted of an alcohol tax violation (App. 47.) He was asked, on direct examination, whether the neighborhood of 45th and Vincennes meant anything to him and, over objection, he stated that on the second floor at 4502 Vincennes Avenue, a man known as Big John has operated a speakeasy for several years, and the place had been raided and seizures made there several times. The court stated, on motion that this testimony be stricken, that he would review it later. The witness never saw the defendant on 4502 South Vincennes (App. 49.)

On cross examination he stated that the shopping bags were submitted to "our" fingerprint man, who found some prints but could not testify. (He has since died.) The fingerprint man was alive at the time when hearing was had before Commissioner Pike, but he was not present at that time (App. 50.)

Hambach testified further, on cross examination, that Investigator Fletcher took samples from the jug, and the rest of the alcohol and jugs were destroyed (App. 50.) He did not attach any importance to the fact that there might be some conflict between his testimony and that of Mr. David with respect to the height of the bottle and the height of the top of the bags (App. 50.)

On further cross examination, the witness testified that he suspected the petitioner was going to deliver something to 4502 Vincennes Avenue, but did not wait to see whether he would get out of the car and take any alcohol up to 4502 Vincennes Avenue and arrest him there, because when he got to 45th and Vincennes Investigator Roseboro

was already at the car (App. 52, 53.) The witness was not positive whether he testified, before Commissioner Pike, as to any conversation he had had with Mr. David (App. 53.) At the time of the arrest of the petitioner, he had neither a warrant for Mr. David's arrest nor did he have a search warrant in his possession (App. 55.) He saw a bag with the three one-gallon glass jugs in it. The bags were about two feet high. The jugs were about ten to twelve inches high. He could not tell what was in the bottles at the time he looked in the car (App. 58.) The liquid was colorless; it might have been water.

Hambach never saw the petitioner go into the place at 4502 Vincennes Avenue (App. 59.) He testified that "we had received information from a reliable source that he (David) was delivering alcohol to this address. This reliable source was an informer, Willie Jones. The witness did not know where Willie Jones lived. Jones used to call him from time to time, and he would meet Jones at appointed places on the South Side. Jones did not call him (the witness) on this occasion, November 20 (App. 59, 60.) He first met Jones two or three years ago on the South Side, in a raid; he didn't know where this Willie Jones lives (App. 60, 61.)

The witness testified before Commissioner Pike on July 9, 1954. At that time the witness stated that it's possible that this question was asked and that he made this answer:

"Q. Who did you get your information from?

"A. Well, that's from a confidential informer whose name I would refuse to divulge." (App. 61.)

If that question was asked, that is probably the answer the witness gave. Hambach never raided the premises at 4502 Vincennes Avenue. He never arrested the man there (App. 61.) He has seen the man about the premises. He is a colored man, known as Big John (App. 62.)

Fred D. Roseboro, an investigator in the Alcohol Tax Division, testified (App. 62-72) that he had occasion, in his official capacity, to investigate the petitioner (App. 63.) He saw David on November 20, 1953. He didn't see the petitioner prior to that date. On November 20, 1953, he saw David in an old Packard sedan parked near the corner of 45th and Vincennes Avenue. He asked David what he had in the car, and David answered "Nothing." The witness saw two shopping bags on the floor, in the back of the car. He saw the neck of what appeared to be one-gallon glass jugs (App. 64.)

He said to David: "You have moonshine in this car. I can see it in the back of the car. I am going to search the car." David asked Roseboro whether he had a search warrant and Roseboro replied, "I don't need a search warrant." (App. 65.)

The witness took one jug out of one of the shopping bags, and one out of the other. He unscrewed the top, dipped a finger into the colorless liquid in the jugs and tasted and smelled it, and found it to be distilled spirits. He *then* placed David under arrest (App. 65.)

Roseboro was familiar with the neighborhood of 4502 S. Vincennes Avenue. Over objection he said that he knew it was the place of a known bootlegger who resided at that address (App. 66.)

On cross examination, the witness testified that he saw the *necks* of two jugs but did not see the liquid at that time (App. 66.) He stated to David: "You have moonshine in the car," or "You're transporting moonshine in the car." Roseboro did not see any moonshine in the car at that time or prior thereto (App. 66, 67.) He had no search warrant at the time, nor a warrant for the arrest

of David. At the time he either had to taste the liquid or smell it before he knew that distilled spirits were in the car and that is what he did: put his finger in the bottle in order to taste it and to smell it (App. 67.)

The witness presumed that the glass jugs were destroyed. They were turned over to Investigator Fletcher. He did not recall ever asking Fletcher where those jugs were, prior to coming to court (App. 67.) He estimated the bags as being 10 or 12 inches in height, he did not measure them. The necks of the bottles were about 1½ or 2 inches long. The liquid in the jugs came to the top of the necks of the bottles. The necks are narrow, about 2 inches in height.

Roseboro testified, under oath, before Commissioner Pike on July 19, 1954. At that time he could have testified that the bags were two feet in height. That was his best recollection at the time; and he would say that his recollection at that time was better than at the time of his present testimony (App. 70.)

Roseboro could not recall ever being at the premises at 4502 S. Vincennes prior to November 20, 1953. He never made an arrest there, nor made a raid prior to November 20, 1953. He could not recall whether the jugs had handles on them (App. 70, 71.) On redirect, he did not notice anything wrong with David's automobile when he drove it away; it was about ten or twelve years old (App. 71.)

Columbus Fletcher, a Government Alcohol Agent, testified (App. 72-84.) that he first saw the defendant on November 6, 1953, and again on November 20, 1953 (App. 73.) On November 6, 1953, he saw the defendant park his car on the southwest side of 45th and Vincennes (App. 73.)

The witness at that time was on an adjacent corner. After David parked his car, he sat therein for approximately five minutes, then he got out of the car, looked around and took two shopping bags out of the rear of the automobile. Fletcher saw David take the two shopping bags into the side entry of the building located at 4502 South Vincennes. After the passage of 10 minutes, he saw David come out of the building carrying two empty shopping bags (App. 74); David then drove away. He saw nothing further on November 6. On November 20, accompanied by Roseboro, he saw David at about 10:30 in the morning at 45th and Vincennes. He saw Roseboro take one of the jugs from the rear of the car, unscrew it, taste and test the contents, and heard Roseboro say it was moonshine (App. 75.)

Investigator Hambach came up then and told David he was under arrest (App. 75.) The witness took a *composite* sample from all five jugs on November 20 and transmitted it to the chemist for analysis. This was placed in a one-pint bottle (App. 76.)

On cross examination the witness testified that on July 9, 1954 he did not appear before Commissioner Pike, nor was he asked to appear (App. 78.) Roseboro and Hambach knew about the facts to which the witness had testified on or about July 9, 1954. The first time the witness discussed this case with anybody in the District Attorney's office was the morning that he testified (App. 78, 79.) On November 6, 1953, he did not look in the shopping bags that David carried, nor did he attempt to make an arrest at that time (App. 80.) Immediately after David entered 4502 South Vincennes Avenue he did not seek a search warrant, nor did he make any arrest at 4502 Vincennes thereafter (App. 80.) To his knowledge, nobody else made an arrest (App. 81.) At the time David was carrying the bags across the street, on November 6, Fletcher did not

try to look into the bags. His duties as an investigator were to seek out information on violations of non-tax paid distilled spirits and to make arrests if the violations occurred in his presence (App. 81.)

Fletcher was at the office of the Alcohol Tax Division at the time David was brought in (App. 83.) He remained for approximately an hour. There was conversation between Roseboro and David. David was asked about his financial status, and the witness thought that David answered that he had no financial status. Fletcher could not recall the exact conversation, nor could he recall any conversation between David and Hambach (App. 84.)

Herman David, being recalled, testified he did not know any person by the name of Willie Jones, nor could he recall ever meeting a person by that name. He denied the conversation that Mr. Hambach testified to, in which Hambach asked him about his financial status and that David said he was hard up and had to sell or bottle some alcohol (App. 85.)

Additional Evidence at Trial.

The Assistant District Attorney stated that there would be no additional evidence introduced in the trial of the case and that the testimony would be the same as was presented on the motion to suppress (App. 26.) However, in order that the Government's record might be complete, since the attorneys' memories were not too clear, it was stipulated that the contents of the jugs which were seized contained alcohol and that the containers bore no Internal Revenue stamps. It was further stipulated that venue had been proved (App. 27.)

It was stipulated that Government witnesses would identify Herman David as the defendant in the case (App. 28.)

It was agreed that if the chemist were present he would testify that Exhibit 1, the pint bottle, contained alcohol. This stipulation was subject to the defendant's objection that the evidence is inadmissible because of an illegal search and seizure. The Court overruled the objection and ordered the evidence as stipulated be admitted to evidence (App. 29.)

It was further stipulated that Mr. David's residence at Dolton, Illinois, is in the Northern District of Illinois, Eastern Division.

It was during the foregoing stipulations that the testimony presented on the motion to suppress was received in evidence (App. 29.)

Defendant's counsel made a motion for judgment of acquittal and the same was denied (App.); the Court then found the defendant guilty of the charge in the indictment (App. 30; 88.) The Court ordered the defendant committed to the custody of the Attorney General for imprisonment for a period of two years (App. 88.)

CONTESTED ISSUES.

I.

Whether the Federal alcohol agents had sufficient probable cause to search the defendant's automobile and to seize the alcohol therein.

II.

Whether the admissible evidence proved the defendant guilty of the charge in the indictment beyond a reasonable doubt.

PROPOSITIONS OF LAW RELIED ON.

A. The result of an unlawful search and seizure does not convert it into a lawful one.

Byars v. *United States*, 273 U.S. 28, 29, 71 L. Ed. 520, 522, 47 S. Ct. 248.
United States v. *Di Re*, 332 U.S. 581, 595, 92 L. Ed. 210, 220, 68 S. Ct. 22.

B. Where a litigant refuses or fails to produce evidence exclusively under his control, a presumption arises that such evidence would be unfavorable to him and favorable to his opponent.

Scanlon v. *United States*, 223 F. 2d 382, 392.

C. There was no probable cause sufficient to authorize the Federal officers to search defendant's automobile without a warrant.

Gambino v. United States, 275 U.S. 310, 48 S. Ct. 137, 72 L. Ed. 293.
Emite v. United States, 15 F. 2d 623.
United States v. Allen, 16 F. 2d 320.
Brown v. *United States*, 4 F. 2d 246.
Moring v. *United States*, 40 F. 2d 267.
Wisniewski v. *United States*, 47 F. 2d 825.

ARGUMENT.

I.

A. The result of an unlawful search and seizure does not convert it into a lawful one.

B. Where a litigant refuses or fails to produce evidence exclusively under his control, a presumption arises that such evidence would be unfavorable to him and favorable to his opponent.

C. There was no probable cause sufficient to authorize the Federal officers to search defendant's automobile without a warrant.

It is manifest from the foregoing testimony of the three investigators for the Alcohol Tax Bureau that the following facts and situation existed in connection with the arrest of the defendant, and the search and seizure of distilled spirits found in his car, on November 20, 1953:

1. None of the Government agents had a search warrant to search the car of the Defendant, nor a warrant for his arrest.

2. None of the investigators had any information from an informer, or otherwise, that the Defendant would have distilled spirits in his possession on November 20, 1953.

3. Prior to the search of the Defendant's car, the agents did not know that distilled spirits were in the car.

4. Roseboro, the agent who made the search, could only see the necks and a couple of glass jugs, and could not see any liquid in the jugs as they rested in shopping bags.

5. The glass jugs were from 10 to 12 inches in height, and the shopping bags which contained them were about 20 inches in height or more.

6. The liquid in the glass jugs was colorless, and without tasting or smelling the contents, could have been water, mineral oil, distilled white vinegar, or any similar colorless liquid.

7. Roseboro had to taste and smell the liquid, by inserting a finger therein, before he knew that the liquid was distilled spirits.

The result of an unlawful search and seizure does not convert it into a lawful one. In the case of *Byars* v. *United States*, 273 U.S. 28, 29, 71 L. Ed. 520, 522, 47 S. Ct. 248, the Supreme Court held:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. *Weeks* v. *United States*, 232 U.S. 383, 393, 58 L. ed. 652, 655, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; *Gouled* v. *United States*, 255 U.S. 298, 306, 65 L. ed. 647, 651, 41 Sup. Ct. Rep. 261; *Amos* v. *United States*, 255 U.S. 313, 65 L. ed. 654, 41 Sup. Ct. Rep. 266; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 391, 64 L. ed. 319, 321, 24 A.L.R. 1426, 40 Sup. Ct. Rep. 182; *Agnello* v. *United States*, 269 U.S. 20, 33, 70 L. ed. 145, 149, 46 Sup. Ct. Rep. 4."

Similarly, in the case of *United States v. Di Re*, 332 U.S. 581, 595, 92 L. Ed. 210, 220, 68 S. Ct. 22, the Supreme Court stated:

> "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.
>
> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

The agents stated that 45th and Vincennes was a neighborhood in which a known bootlegger, "Big" John, lived. The address is stated to be 4502 S. Vincennes Avenue, yet none of the agents ever arrested "Big" John, nor, prior to November 20, 1953, none of them had ever been in the premises during said period, none of them had raided the premises, none had seen any distilled spirits on the premises, and none had seen distilled spirits carried into the premises.

True, Agent Fletcher stated that he saw the Defendant carry two shopping bags into the building at 4502 S. Vincennes Avenue, but he did not know what was in the shopping bags. After the shopping bags were delivered at 4502

S. Vincennes Avenue no attempt was made to obtain a search warrant for the search of the premises and the seizure of any contraband.

We find that the distilled spirits, illegally seized, are missing. Only a pint thereof has been preserved for use in the trial of the Defendant, if the same becomes necessary. The shopping bags are missing, and the glass jugs are missing. It is a strange situation, indeed, that agents can determine what portion of the evidence seized they shall bring into court on the trial. Production of the shopping bags and the glass jugs would show the relative size of each, and it could be very easily determined, by placing the jugs within the bags, whether anybody could see even the necks of the glass jugs. Where evidence is in the possession of an adverse party, and he fails to produce the same, the presumption arises that the said evidence would be unfavorable to him. *Scanlon* v. *United States*, 223 F. 2d 382, 392.

In the case of *Emite* v. *United States*, 15 F. (2d) 623 (C.A. 5), a search was made of an automobile moving on a public highway; the automobile was stopped by federal officers. The Court of Appeals observed:

> "The testimony of the witness, not only did not show that, before the search was made, the officers had probable cause to believe that an offense had been committed, but indicated the absence of such probable cause. Probable cause did not exist, unless the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched. *Carroll* v. *United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790; *Pales* v. *Paoli* (C.C.A.) 5 F. (2d) 280.

"The facts and circumstances which the testimony showed were within the knowledge of the two officers before the search was started furnished no basis for a reasonable belief or inference that the searched car contained intoxicating liquor. The facts that an automobile moving on a public highway appears to be heavily loaded and is driven carefully are entirely consistent with a legitimate use of it, and do not warrant a reasonable belief that it is being used as a means of committing a criminal offense. The testimony indicated that the officers had no knowledge or information of any illegal use of the searched car, or that its owner or an occupant of it had committed or intended to commit any criminal offense. The testimony as to what the witness had been told did not indicate that his informant was trustworthy, or that he even claimed to know that what he said was true.

"Evidence of the fact that an automobile of an employee of an ice manufacturer was seen parked on the employer's premises, where some unidentified person said automobiles used in hauling liquor from the employer's plant were parked, plainly would not, by itself, or in connection with evidence of the fact that that automobile, when apparently heavily loaded, was seen on a public highway, where it was being carefully driven, be enough to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in that automobile. A search without warrant of an automobile is not justified by a mere suspicion, based on the facts that it came from a small town having the reputation of being a haven for bootleggers, and that it had been seen parked on an ice manufacturer's premises which were said to be used for parking cars which hauled liquor from that place.

"On its face the testimony of the witness negatived the conclusion that, prior to the search of the automobile, the witness or the other officer, by the use of their senses or otherwise, had learned of facts that would warrant a reasonably prudent man in believing

that it then was being used in transporting liquor, or in the commission of any other crime. It appearing on the face of the testimony that the knowledge of the witness of the fact that the automobile contained intoxicating liquor was obtained by a search made without a warrant, and without probable cause to believe that a crime was being committed in his presence, that testimony was subject to be excluded on the ground that the knowledge of the witness of the incriminating facts deposed to was obtained by a violation of the constitutional provision against unreasonable searches. We conclude that the above-mentioned ruling was erroneous. Because of that error, the judgment is reversed; and the cause is remanded for another trial."

In the case of *United States* v. *Allen*, 16 F. (2d) 320, (D.C., Fla.), a prohibition agent testified that he had "information that some automobiles were going to haul whiskey over this road that night." The kind of automobile that he was looking for was a master six Studebaker sedan, a Ford coupe, a Dodge truck and a Studebaker roadster. On the night in question he saw a Studebaker automobile followed by a Ford coupe; he did not see who was in the car and did not see the contents of the car. His conclusion that the Studebaker car was used for transportation of alcoholic liquors was based upon his observation that "it appeared to be loaded and was rather dirty; appeared to be on a long drive—had mud on the back part of the spare tire cover and fenders."

The agent stopped the car but did not know that it contained intoxicating liquor until after that time. The Court stated:

"The government, in urging the admission in evidence of the liquors in question, relied entirely upon the holding of the United States Supreme Court in the case of *Carroll et al.* v. *United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790. The rule of law controlling the question of search and seizure

of automobiles on the public highways, without the aid of search warrants, is clearly and distinctly laid down in the *Carroll* Case. This rule is to the effect that such searches and seizures are legal when the facts and circumstances within the knowledge of the seizing officers, and of which they have reasonable trustworthy information, are such in themselves to 'warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile * * *' which is the subject of such seizure."

Quoting from Mr. Chief Justice Taft in the *Carroll* case, the Court said:

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary. * * * But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search, unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The Court concluded:

"In my opinion, the facts in this case are not such as would 'warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched', that the search and seizure, measured by this rule laid down in *Carroll* v. *United States, supra,* was unreasonable and in violation of the Fourth Amendment to the Constitution.

"The objection of the defendant to the introduction in evidence of the intoxicating liquor so seized will be sustained."

In *Gambino* v. *United States*, 275 U.S. 310, 48 S. Ct. 137, 72 L. ed. 293, the facts were briefly stated at page 312 of the official report as follows: "On August 1, 1924, Gambino and Lima were arrested by two New York state troopers, near the Canadian border; their automobile (while occupied by Gambino and therefore within the protection accorded to his person) was searched without a warrant; and intoxicating liquor found therein was seized."

At page 313 of the official report, the Supreme Court stated that there was not probable cause for the search in the following terse language: "We are of the opinion on the facts, which it is unnecessary to detail, that there was not probable cause."

In another interesting case, *Brown* v. *United States* (C.A. 9) 4 F. 2d 246, the Court made the following observations of fact and law:

> "'If the seizure is merely based upon a suspicion, and the facts are not sufficient to justify an arrest, the subsequent discovery by an examination of the evidence, secured by the seizure, that the suspicion was in fact well founded, is not sufficient to make what was unlawful at its commencement a lawful search. • • • The proper test, supported by the great weight of authority, by which this case should be decided, is: Were the circumstances presented to the officers through the testimony of their senses sufficient to justify them in a good-faith belief that plaintiff in error was in their presence transporting liquor in violation of law or that he had in their presence liquor in his possession in violation of law? In other words, was there probable cause for them to so believe, or were the facts sufficient to give rise merely to a suspicion thereof? If the former the arrest was legal and the evidence secured by it admissible. If the latter, the arrest was illegal, and the evidence obtained not admissible' *Garske* v. *United States*, (C.C.A.) 1 F. 2d 620, 625.

"The officer who made the arrest was the only witness at the trial. He testified that the plaintiff in error parked his car at the curb of one of the public streets of the city of Portland, removed a package from the back part of the car, and started up the street; that the package was not smooth, and from its appearance might contain bottles; that he then placed the plaintiff in error under arrest; that prior to that time he had been informed that the plaintiff in error was a bootlegger, and that the license number of the car driven by the plaintiff in error had been furnished him but the source of his information was not disclosed in either case; that on another occasion the plaintiff in error had delivered a package at an office building in the city, and that the form of the package indicated that it might contain two bottles, but what the package contained he did not know, nor did he know what the package in this case contained. Beyond the foregoing, the officer had no knowledge of any kind, and no information from any source, that a crime *was being* committed in his presence. He testified repeatedly that he had no such knowledge, and that he acted on suspicion only. While an officer may arrest without warrant for reasonable cause, he can only act upon evidence; he cannot act upon mere suspicion.

"If, instead of arresting the plaintiff in error, the officer had presented all the facts within his knowledge and all the information at hand to a magistrate, no magistrate would issue a warrant of arrest for the plaintiff in error; no magistrate would hold the plaintiff in error to answer for a crime before another tribunal; no grand jury would indict; no court would submit the case to a jury; and, if the officer were sued for false imprisonment, no court would instruct that the arrest was justified, assuming all the foregoing testimony to be true. If we are correct in these conclusions, and we see no escape from them, the arrest was without authority of law, and the property wrongfully seized was not admissible in evidence.

"The judgment is therefore reversed, and the case is remanded for a new trial."

In the case of *Moring* v. *United States*, 40 F. 2d 267 (C.A. 5), the appellant was the owner of two automobiles which Government officers stopped. The appellant was riding in the automobile in front and the one in the rear was being driven by another under his direction. Search was made without appellant's consent, and the liquor that was seized was found in the automobile in which he was not riding. The Court of Appeals stated:

> "The officers had no reasonable cause to believe or suspect that either of the automobiles contained liquor, but stopped them to see whether they did or not. Under these circumstances we are of opinion that they were without authority of law to stop or search the automobiles, and that it was error to base a conviction upon evidence seized upon such search. Evidence discovered upon an unlawful search is inadmissible, and a conviction cannot be based upon it. The case is controlled by our decision in *Emite* v. *United States*, 15 F. 2d. 623."

An important decision on the question under discussion is *Wisniewski* v. *United States* (C.A. 6) 47 F. 2d 825, 826. This case holds that information from a so-called informer, without more, is insufficient to constitute probable cause. A much stronger case as to probable cause appears in the *Wisniewski* case than that which appears in the instant, David situation. The facts and conclusions of the Court in the *Wisniewski* case are as follows:

> "In the instant case the chief objection of appellant is based upon the fact that the source of information of the arresting officers was not disclosed either by naming the informer, describing his exact relationship to the department and the source of his information, or otherwise. The arresting officers testified that on August 23, 1930, they had been 'informed' that the defendant, who was said to be dealing in intoxicating

liquors, was to make a delivery during that forenoon at his meat market at 900 Michigan Avenue in the city of Grand Rapids; that similar information had been received on four previous occasions from the same informer with reference to others, and that it had on each such other occasion proved reliable; and that the delivery was to be made either in a Studebaker sedan bearing license No. 594,190, or in an Essex coach bearing license No. 594,191. They also testified that before the time in question information had been received from the deputy administrator that defendant was selling whiskey at his meat market.

"*With this information as the basis for suspicion, possibly insufficient in itself to constitute probable cause,* the officers went to the vicinity of defendant's place of business for purposes of observation. They testified that while there they saw the defendant talking to a known bootlegger, and that he got a burlap sack and a jug out of the bootlegger's car and placed it in the Essex coach which had been previously identified by its license number. Shortly thereafter the defendant left his place of business, got into the Essex coach, and drove away. About ten minutes later he returned and stopped nearby. The arrest thereupon followed. At the time of the arrest defendant was still in his Essex coach and beside him upon the seat was the jug covered by the burlap sack. The jug contained three gallons of whiskey." (Emphasis supplied).

CONCLUSION.

From a comparison of the testimony and evidence in the *David* case with the facts recited in the foregoing decisions and the application of the principles of law recited therein, it seems manifest that there was no probable cause whatever for the Federal agents to search the defendant's automobile without a search warrant and to seize the alcohol therein and to arrest the defendant without a warrant. The defendant's motion to suppress the evidence seized should have been allowed; and since there was no other admissible evidence against the defendant, he should have been found not guilty of the charge in the indictment. Hence, the defendant respectfully asserts that the judgment against him should be reversed by this Honorable Court.

Respectfully submitted,

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